



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 6, 2013

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-02150

Dear Ms. Angadicheril:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 478107 (UT OGC No. 147390).

The University of Texas at Austin (the "university") received a request for contracts regarding athletic events by which the university has granted media and/or broadcasting rights to the Big 12 conference or any other conference, and all correspondence related to any responsive contract, and the possible expansion of the Big 12 conference, as well as the possibility of the university joining the PAC-12 or PAC-10 conference. You state the university has provided or will provide some of the responsive information to the requestor. You state the university will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to the previous determination in Open Records Decision No. 684 (2009).¹ You claim portions of the remaining requested information are excepted from disclosure under sections 552.107, 552.111, and 552.136 of the Government Code. Additionally, you state release of some of this information may implicate the proprietary interests of the Big 12 Conference (the "Big 12") and the University of Oklahoma ("OU"). Accordingly, you state, and provide documentation showing, you notified the Big 12 and OU of the request for information and of their right to submit

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from an attorney for the Big 12. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

The Big 12 argues the information relating to the Big 12 is not subject to the Act. Section 552.021 of the Government Code provides for public access to "public information," *see* Gov't Code § 552.021, which is defined by section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988).

The Big 12 contends the information at issue is not subject to the Act because the Big 12 is not a governmental body. We note, however, the information at issue consists of emails and attachments between the university, the Big 12, and other third parties that were sent to the university and are in the possession of the university. Furthermore, this information was collected, assembled, or maintained in connection with the transaction of the university's official business, and the university has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and must be released, unless the Big 12 or the university demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Next, you state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2010-12603 (2010), 2010-12702 (2010), 2010-12706 (2010), 2010-12707 (2010), 2010-12819 (2010), 2010-13330 (2010), 2010-14461 (2010), 2011-16115 (2011), and 2011-16228 (2011). You state the law, facts, and circumstances on which these prior rulings were based have not changed. Accordingly, we conclude the university must continue to rely on these rulings as previous determinations and withhold or release the previously ruled upon information in accordance with Open Records Letter Nos. 2010-12603, 2010-12702, 2010-12706, 2010-12707, 2010-12819, 2010-13330, 2010-14461, 2011-16115, and 2011-16228. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, circumstances on which

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We next address the university's argument under section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See TEX. R. EVID. 503(b)(1)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails and attachments you have marked consist of attorney-client privileged communications between internal and external counsel for the university and university employees, made for the purpose of effectuating legal representation. You further state the communications have been kept confidential. Based on your representations and our review,

we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Thus, the university may generally withhold the information you have marked under section 552.107(1) of the Government Code. We note, however, one of the e-mail strings includes an e-mail received from a non-privileged party. Furthermore, if the e-mail received from the non-privileged party is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if this non-privileged e-mail, which we have marked, is maintained by the university separate and apart from the otherwise privileged e-mail string in it appears, then the university may not withhold this non-privileged e-mail under section 552.107(1) of the Government Code.

We next address the university's argument under section 552.111 of the Government Code, which excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has concluded a preliminary draft of a document that has been or is intended for public release in its final form necessarily represents the drafter's advice, opinion, and

recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You claim the information you have marked is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. You argue the information you have marked pertains to internal deliberations between university representatives, which you have identified; representatives of other Big 12 member universities; and Big 12 representatives. Additionally, you state the draft document you marked has been released to the public in its final form. Upon review, we find the information we have marked within the discussions between only university representatives, including the draft document, constitutes advice, opinion, and recommendation relating to policy matters of the university. As such, the university may withhold the information we have marked, including the submitted draft document in its entirety, under section 552.111 of the Government Code on the basis of the deliberative process privilege. However, we find the remaining discussions between only university employees do not consist of advice, opinion, or recommendation, but rather consist of general administrative and purely factual information. Additionally, as to the communications with representatives of other Big 12 member universities and Big 12 representatives, you generally assert the university, the other Big 12 member universities, and the Big 12 share a common deliberative process, as well as a privity of interest, with regard to the remaining information at issue. You have not, however, explained how the representatives of the Big 12, the other member universities, or the other third parties, in this instance, are involved in the university's policymaking process or have policymaking authority regarding university matters. We further note some of the information at issue contains communications relating to contract negotiations between the university and these entities. Because the university and these entities were negotiating contracts, their interests were potentially adverse at the time the communications were made. Thus, the university did not share a privity of interest or common deliberative process with regard to this information. Therefore, we find you have failed to demonstrate how the

university shares a privity of interest or common deliberative process with these individuals with respect to any of the remaining information. Consequently, we find none of the remaining information is excepted under the deliberative process privilege, and the university may not withhold it under section 552.111 of the Government Code.

Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.³ Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note section 552.117 also encompasses a personal cellular telephone or pager number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). The remaining information contains the cellular telephone number of a university employee. To the extent that the employee timely elected to keep such information confidential under section 552.024 and the cellular telephone service is paid for with personal funds, the university must withhold the information we have marked under section 552.117 of the Government Code. If the employee did not make a timely election under section 552.024 or the cellular telephone service was not paid for with personal funds, the university may not withhold the information we have marked under section 552.117 of the Government Code.

Section 552.136 of the Government Code states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). Upon review, we conclude the university must withhold the information you have marked under section 552.136 of the Government Code.

The Big 12 claims a portion of the information at issue is excepted under section 552.110(b) of the Government Code, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing,

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

The Big 12 argues the information at issue, which consists of its financial projections, constitutes commercial and financial information that, if released, would cause its organization substantial competitive harm. Upon review, we find the Big 12 has established its financial projections, which we have marked, constitute commercial or financial information, the release of which would cause the Big 12 substantial competitive harm. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code.

Finally, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received any correspondence from OU. Thus, OU has not demonstrated that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold the submitted information on the basis of any proprietary interests OU may have in the information.

In summary, to the extent the information at issue is identical to the information previously requested and ruled upon by this office, the university must rely on our previous rulings and withhold or release the previously ruled upon information in accordance with those rulings. The university may withhold the information you have marked under section 552.107(1) of the Government Code; however, to the extent the marked non-privileged e-mail exists separate and apart from the otherwise privileged e-mail string, it may not be withheld under section 552.107(1). The university may withhold the information we have marked under section 552.111 of the Government Code. The university must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code to the extent the employee concerned timely elected under section 552.024 of the Government Code to keep her information confidential and pays for the cellular telephone service. The university must withhold the information you have marked under section 552.136 of the Government Code. The university must withhold the information marked under section 552.110(b) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/tch

Ref: ID# 478107

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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